

## IN THE UNITED STATES DISTRICT COURT

## FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 FIREMAN'S FUND INS.,

No. C 07-06302 CRB

12 Plaintiff,

**ORDER DENYING MOTION FOR  
JUDGMENT ON THE PLEADINGS**

13 v.

14 GERLING AMERICA INS.,

15 Defendant.

17 Defendant Gerling America Insurance Co. moves for judgment on the pleadings on  
18 the ground that the complaint of Plaintiff Fireman's Fund Insurance Company ("FFIC") fails  
19 to state a claim for coverage under the governing Gerling insurance policy.<sup>1</sup> For the reasons  
20 set forth below, the motion is DENIED.

21 Following a trial in the District Court for the Southern District of Florida, a jury found  
22 that Gencor Industries was liable to FFIC for damages for breach of contract and negligence  
23 in the amount of \$1,751,913.10. In the amended final judgment, the court clarified that:

24 In accordance with the Stipulation of record executed by and between  
25 the parties and GENCOR's insurer, Gerling America Insurance Company, and  
26 pursuant to the terms and requirements of the GENCOR bankruptcy  
proceeding in United States Bankruptcy Court . . . , this is not an in personam  
Judgment against GENCOR and shall not be subject to execution against  
GENCOR.

27

---

28 <sup>1</sup> Plaintiff styles its opposition as a "cross-motion for partial judgment on the pleadings." Because Plaintiff failed to notice its motion more than 35-days prior to the hearing date, the Court treats Plaintiff's response solely as an opposition brief. See Northern District of California Civil Local Rule 7-2(a).

1 After judgment, the suit was transferred to this Court pursuant to 28 U.S.C. § 1404(a), so that  
 2 FFIC could seek to recover the judgment from Gerling – Gencor’s insurer – in a more  
 3 convenient forum.

4 Gerling notes that pursuant to its agreement with Gencor, it only agreed to pay “those  
 5 sums that the insured becomes legally obligated to pay as damages because of . . . ‘property  
 6 damages’ to which this insurance applies.” See Fourth Amended Complaint Exh. 1 § I.1.a.  
 7 In short, Gerling contends that because the judgment cannot be executed against Gencor,  
 8 Gencor is not legally obligated to pay any damages pursuant to the FFIC litigation. Hence,  
 9 Gerling argues, the Florida judgment does not trigger Gerling’s duty to provide coverage.

10 Of course, Gerling’s position is premised on the assumption that because FFIC cannot  
 11 execute the judgment against Gencor, Gencor is not “obligated to pay.” But because this  
 12 action was transferred from Florida district court, Florida law governs. See Van Dusen v.  
 13 Barrack, 376 U.S. 612, 634-36 (1964). Under Florida law, “the mere fact that a legally-  
 14 obtained judgment may not be enforced against a party does not mean that the party is not  
 15 ‘legally obligated to pay.’” Auto-Owners Ins. Co. v. St. Paul Fire & Marine Ins. Co., 547  
 16 So.2d 148, 152 (Fla. Dist. Ct. App. 1989). Florida courts have held that an insurer is  
 17 obligated to satisfy a judgment against the insured pursuant to insurance agreement language  
 18 identical to that at issue in this case even where the insured is judgment-proof. Id.; Rosen v.  
 19 Florida Ins. Guar. Ass’n, 802 So.2d 291, 298 (Fla. 2001). That Auto-Owners concerned a  
 20 settlement agreement that contained a covenant not to execute does not render the decision  
 21 inapposite. To the contrary, the conclusion that an insurer is obligated to pay a judgment  
 22 imposed against a judgment-proof insured under an “obligation to pay” clause is equally  
 23 controlling under the circumstances of this case. Accordingly, the motion for judgment on  
 24 the pleadings is DENIED; the hearing scheduled for May 30, 2008 is VACATED.

25 **IT IS SO ORDERED.**

26  
 27 Dated: May 20, 2008  
 28

  
 26  
 27 CHARLES R. BREYER  
 28 UNITED STATES DISTRICT JUDGE